

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Michael D. Petersen, Petitioner

**RECOMMENDATION ON MOTION  
FOR SUMMARY DISPOSITION**

v.

Todd County, Respondent

This matter came before Administrative Law Judge Eric L. Lipman on February 11, 2008, on Cross-Motions for Summary Disposition.

Respondent Todd County moved for Summary Disposition on January 30, 2008. Petitioner Petersen responded and made a cross-motion for Summary Disposition on February 11, 2008. Oral argument was had on both motions on February 11, 2008. Following additional submissions from both parties, the hearing record on the cross motions closed on February 26, 2008.

Kristi A. Hastings, of Pemberton, Sorlie, Rufer & Kershner, P.L.L.P., appeared on behalf of Respondent. Jennifer R. Petersen of Parsonage Vandennack Williams LLC, appeared on behalf of Petitioner.

Based on the proceedings, memoranda and files herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATION**

**IT IS RESPECTFULLY RECOMMENDED THAT:**

- (1) Respondent's Motion for Summary Disposition be GRANTED.
- (2) Michael D. Petersen's petition for relief under the Veterans Preference Act be DISMISSED.

Dated: March 24, 2008

/s/ Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

Reported: Digitally Recorded

## **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of Veterans Affairs to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

## MEMORANDUM

### Factual Background

Respondent Todd County, is a county government in central Minnesota.<sup>[1]</sup> The County employs 250 people and has an annual operating budget of \$30 million.

On or about August 1, 2007, the County hired Petitioner, an honorably discharged veteran, to serve as its first-ever County Administrator.<sup>[2]</sup> At the time he was hired for the newly-established post, Mr. Petersen served as a County Supervisor of Wapello County, Iowa.<sup>[3]</sup>

The County Administrator system is one of four organizational models that are available to county governments under Chapter 375A. The county administrator position is statutorily created under Minnesota Statutes section 375A.06.

Under section 375A.06, subd. 4, the County Administrator is the “administrative head of the county.” The Administrator is “responsible for the proper administration of the affairs of the county placed in the administrator’s charge” exercises “general supervision over all county institutions and agencies and, with the approval of the county board, coordinate[s] the various activities of the county and unif[ies] the management of its affairs.” The Administrator “may act as the head of any department, the appointment of which is made by the county board.”

In its Position Description, Todd County further described the County Administrator’s responsibilities:

The Administrator is responsible for directing and managing the overall operations, departments and personnel who are directly accountable to the Todd County Board of Commissioners in conformance with Minnesota Statute 375A.06. The position will report directly to the County Board and act as liaison with the 17 County departments, which provide a full range of services to the County’s 24,600 residents. This will centralize many administrative services to improve management of the County’s 250 employees and budget of 30 million.<sup>[4]</sup>

The description included the following duties: The Administrator “act[s] as chief financial officer of the County,” “directs ... overall county economic development,” and “supervises department heads.”<sup>[5]</sup>

Petitioner and the County entered into an Employment Agreement, through which Petitioner agreed to serve as the County Administrator as set forth in the position description.<sup>[6]</sup>

The Employment Agreement provided Petitioner “the rights of a public employee as governed by Minnesota Public Employee Labor Relations Act, Minnesota Statutes Chapter 179A.”<sup>[7]</sup> Significantly, the Agreement also set forth a six-month probationary period for Mr. Petersen. The Agreement reads:

Probationary Period and General Conditions of Employment: Employee is subject to a 6-month probationary period during which time the Employer may evaluate the Employee’s performance at any time. Employee is entitled to Termination Benefits as provided in paragraph 14 below. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the Employee to resign at any time, for any reason, subject only to the provisions of this Agreement. Furthermore, nothing in the Agreement shall prevent, limit or otherwise interfere with the right of the Employer to termination of services of the Employee at any time, for any reason, subject only to the provisions of this Agreement.<sup>[8]</sup>

The Agreement also provided for certain “termination benefits.”

In the event the Employee is terminated by the Employer, Employer agrees to pay Employee a lump sum cash payment as follows. One month salary for up to 6 months of employment....However, in the event Employee is terminated because of his conviction of an illegal act involving personal gain to Employee, or for misconduct, then Employer shall have no obligation to pay Termination Benefits...<sup>[9]</sup>

On October 22, 2007, approximately half-way through his six-month probationary period, Petersen was terminated from his position as the Todd County Administrator.

On December 24, 2007, Mr. Petersen filed a Petition for Relief with the Department of Veteran’s Affairs.<sup>[10]</sup>

On January 7, 2008, the Department of Veteran’s Affairs issued a Notice of Petition and Order for Hearing.<sup>[11]</sup>

The Commissioner of Veterans Affairs and the Administrative Law Judge have authority to review this case pursuant to Minn. Stat. §§ 14.50 and 197.481, subd. 4.

## **Standards for Summary Disposition and Mr. Petersen's VPA Claims**

Summary disposition is the administrative law equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.<sup>[12]</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition of contested case matters.<sup>[13]</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.<sup>[14]</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>[15]</sup>

Mr. Petersen argues that he is entitled to a hearing under Minn. Stat. § 197.46. This statute provides that an honorably discharged veteran may not be terminated from county employment “except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.”

Todd County response is three-fold: The County asserts that the VPA protections were superseded (and eliminated in cases such as these) by the provisions of the later-enacted County Administrator statute, Minn. Stat. § 375.06;<sup>[16]</sup> Mr. Petersen's role as County Administrator falls within the “department head” exemption to the VPA; and Mr. Petersen's Employment Agreement provided for a six-month probationary period without VPA hearing rights.<sup>[17]</sup>

In this case, there are no material facts in dispute. The cross-motions present only questions of law – namely: (1) whether the VPA is superseded by the County Administrator authorizing statute, Minn. Stat. § 375.06; (2) whether Mr. Petersen's role as County Administrator falls within the “department head” exemption to the VPA; and (3) whether Mr. Petersen had a separate contractual right to a VPA hearing under his Employment Agreement with the County.

### **Applicability and Reach of Minnesota Statute § 375A.06**

So as to “protect against the inadvertent supersession of the [Veterans Preference Act] by subsequently enacted statutes,” Minn. Stat. § 197.48 requires that any later statute that is “inconsistent” with the VPA must expressly provide for the modification or limiting of the VPA.<sup>[18]</sup> This anti-supersession provision of section 197.48 states:

No provision of any subsequent act relating to any such appointment, employment, promotion, or removal shall be construed as inconsistent herewith or with any provision of sections

197.455 and 197.46 unless and except only so far as expressly provided in such subsequent act that the provisions of these sections shall not be applicable or shall be superseded, modified, amended, or repealed. Every city charter provision hereafter adopted which is inconsistent herewith or with any provision of these sections shall be void to the extent of such inconsistency.

The County Administrator statute, Minn. Stat. § 375A.06, was enacted in 1975 – well after the adoption of the VPA and its anti-supersession provisions.<sup>[19]</sup> Subdivision 1 of the County Administrator statute provides:

The administrator shall be appointed for an indefinite period and may be removed by the county board at any time, but after the administrator has served as administrator for one year the administrator may demand written charges and a public hearing on the charges before the county board prior to the date when final removal takes effect.

In this case, there is no express provision in the later-enacted County Administrator statute that the earlier VPA provisions “shall not be applicable.”<sup>[20]</sup> Mindful that the Legislature insists upon express supersession in this instance, modification or partial repeal of the Act may not be inferred.

Moreover, when the two statutes are read side by side, it does not appear that the County Administrator statute is in conflict with the earlier Veterans Preference Act. For example, the County Administrator statute limits Todd County’s power to terminate non-veteran employees after one-year, by requiring it to provide the discharged employee certain writings and a hearing. This purpose is not irreconcilable with the VPA’s requirement that qualified veteran employees be provided due notice, written charges and the opportunity for a hearing, at an earlier point in time.<sup>[21]</sup>

The conclusion is bolstered by the Minnesota Supreme Court’s holding in *Caffrey v. Metropolitan Airports Commission*. In *Caffrey*, the Court held that the statute which established the Metropolitan Airports Commission (MAC) did not supersede the earlier-enacted VPA. The court concluded that notwithstanding the fact that MAC employees, in general, were “removable at the pleasure of” the commission,” the enabling statute was not intended to repeal or supersede preference rights granted under the VPA. The Court reasoned:

The provision in Minn. Stat. § 473.606, subd. 5, that the employees are ‘removable at the pleasure’ of MAC can be viewed as merely a codification of the general principle that a public corporation has the power to terminate employees at its pleasure. It is well established though that a public corporation's power to terminate employees is

limited if the employee is a veteran. In such a case, [the VPA] requires that the employee be afforded a hearing.<sup>[22]</sup>

Similarly, nothing in the text of the later-enacted County Administrator statute gives cause to believe that the Legislature intended to repeal provisions of the VPA.<sup>[23]</sup>

### **The “Department Head” Exception to the VPA**

Even if the County Administrator statute does not modify the VPA, the question still recurs as to whether Mr. Peterson is excluded from the reach of the Act under the VPA’s “Department Head” exception.

Minn. Stat. § 197.46 provides that “[n]othing ... in this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department...” Although the VPA does not specifically exempt a department head from its protection, the courts have consistently held that the exclusion in the Act for a chief deputy of a department head implies that the department head is also excluded from the VPA.<sup>[24]</sup> The burden is on the public employer to demonstrate that the employee is a department head.<sup>[25]</sup>

In *State ex rel. McGinnis v. Police Service Comm’n*, the Minnesota Supreme Court set forth a multi-factor test for tribunals to use when determining whether an employee is a department head. Those factors are:

- (1) Does the alleged department head have charge over the work done in his department?
- (2) Does the employee’s work require technical, professional training?
- (3) Is the employee the highest authority at that level of government as to the employee’s official duties?
- (4) Does the employee supervise all of the work in the employee’s department?
- (5) Does the success of the employee department depend upon the employee’s technique?
- (6) Are department personnel under the employee’s direction?
- (7) Are the employee’s duties more than merely different from other employees?
- (8) Does the employee have power to hire and fire subordinates?<sup>[26]</sup>

Whether a particular employee is a department head is a question of law.<sup>[27]</sup>

Under section 375A.06, subd. 4, the County Administrator is the “administrative head of the county.” The Administrator is “responsible for the proper administration of the affairs of the county placed in the administrator’s charge.” The Administrator exercises “general supervision over all county institutions and agencies and, with the approval of the county board, coordinate[s] the various activities of the county and unif[ies] the management of its affairs.” Further, as set forth in subdivision 4 of the statute, the County Administrator must: (1) hire qualified staff; (2) provide for the execution of all ordinances and all laws required to be enforced through the county board, by the administrator or by officers who are under the administrator’s direction and supervision; (3) appoint, suspend, and remove county personnel with the approval of the county board; (4) provide for county purchases as directed by the county board; (5) prepare and submit to the county board a proposed annual budget and long-range capital expenditure program, and enforce the provisions of the budget when adopted by the board; (6) attend all meetings of the county board and recommend measures for adoption; (7) examine the books and papers of officers and departments as directed by the county board and report the findings to the county board; and (8) keep the county board fully advised as to the financial condition and needs of the county. Lastly, the statute provides that the Administrator “may act as the head of any department, the appointment of which is made by the county board.”

As detailed in the position description for the Todd County Administrator, the post is the chief administrative position in the County.

The Administrator is responsible for *directing and managing the overall operations, departments and personnel who are directly accountable to the Todd County Board of Commissioners in conformance with Minnesota Statute 375A.06*. The position will report directly to the County Board and act as liaison with the 17 County departments, which provide a full range of services to the County’s 24,600 residents. *This will centralize many administrative services to improve management of the County’s 250 employees and budget of 30 million.*<sup>[28]</sup>

The position description provides that as the Administrator, Mr. Petersen was responsible for ensuring compliance with laws regulating county activities, directing the work of county department heads and developing long-range fiscal plans. This work required at least three years administrative experience in local government and was the most senior, non-elected post in the County.<sup>[29]</sup>

The hearing record establishes that, for a time, Mr. Petersen did exercise these high-level administrative powers. Mr. Petersen directed compliance efforts



of lower-level department heads,<sup>[30]</sup> reviewed suggestions from these managers for reducing line items in the County budget<sup>[31]</sup> and presented to the Board his recommendations for a ten percent budget freeze.<sup>[32]</sup>

When assessing Mr. Petersen's VPA claims, the Minnesota Supreme Court's decision in *Granite Falls Municipal Hospital Board v. Department of Veteran's Affairs* is instructive. In *Granite Falls*, the Minnesota Supreme Court held that a Hospital Administrator was a department head and excluded from the reach of the VPA.<sup>[33]</sup> In analyzing the position of Hospital Administrator under the *McGinnis* factors, the court noted that: (1) the applicable rules and bylaws of the hospital conferred responsibility for the overall administration of the hospital on the Administrator; (2) two years of experience was required for the position; (3) the Administrator was the highest authority but for the hospital board; (4) the Administrator was responsible for compliance with laws regulating all hospital activities and administering personnel policy, even in those instances where the Administrator he was unable to supervise the technical aspects of the performance of each department; (5) the success of the hospital depended upon the technique and competence of the Administrator; (6) the employees were subject to supervision by the Administrator in a non-professional and administrative manner; (7) the Administrator was the only person responsible for hospital administration; and (8) the administrator had the legal power to hire and fire employees.<sup>[34]</sup> The Court noted that all of these factors contributed to its conclusion that the Hospital Administrator was a department head under the VPA – notwithstanding the fact that the Administrator consulted with subordinate department heads on employment matters and the Hospital Board modified the Administrator's decisions from time to time.<sup>[35]</sup>

Mr. Petersen's position as the senior administrative employee in Todd County is not distinguishable in any meaningful respect from that of the Hospital Administrator in *Granite Falls*. Mr. Petersen was the highest non-elected official in Todd County and the general supervisory authority he exercised over subordinate department heads obliges the conclusion that he too was a department head. Application of the multi-factor *McGinnis* test to the facts in this record makes clear that the Todd County Administrator is a department head and is excluded from the reach of the VPA.<sup>[36]</sup>

### **Petitioner's Rights Under the Employment Agreement**

Lastly, Petitioner argues that he was entitled to a VPA hearing under the terms of his Employment Agreement. The Agreement states that Petitioner was provided the "rights of a public employee as governed by Minnesota Public Employee Labor Relations Act, Minnesota Statutes Chapter 179A." Petitioner argues that because he was due the "rights of a public employee," he was likewise entitled to a hearing under the VPA.

This argument, however, is unavailing. Todd County's refusal to extend to Mr. Petersen, a County Administrator within his probationary term, a pre-termination hearing, does not violate the obligations that PELRA imposes upon public employers<sup>[37]</sup> nor it is an unfair labor practice as defined in that statute.<sup>[38]</sup>

## Conclusion

While the County Administrator statute at Minn. Stat. § 375.06 does not supersede the VPA, Mr. Petersen is not entitled to a pre-discharge hearing because he falls within the "department head" exemption to the Act. Moreover, nothing in his Employment Agreement with Todd County alters that result.

E. L. L.

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<sup>[1]</sup> Minn. Stat. § 2.01 (2006).

<sup>[2]</sup> Affidavit of Mark Blessing, at 2.

<sup>[3]</sup> Affidavit of First Michael Petersen, at 1-2 (February 11, 2008); *compare also*, Iowa Code § 39.18 (2006) ("There shall be elected biennially in counties, members of the board of supervisors to succeed those whose terms of office will expire on the first day of January following the election which is not a Sunday or legal holiday").

<sup>[4]</sup> Aff. of K. Hastings, Ex. C.

<sup>[5]</sup> *Id.*

<sup>[6]</sup> Affidavit of Kristi Hastings, Ex. A.

<sup>[7]</sup> Aff. K. Hastings, Ex. A, at ¶ 2.

<sup>[8]</sup> Aff. K. Hastings, Ex. A, at ¶ 13.

<sup>[9]</sup> Aff. K. Hastings, Ex. A, at ¶ 14.

<sup>[10]</sup> See, Notice of Petition and Order for Hearing, Attachment 1 ("Petition").

<sup>[11]</sup> See, Notice of Petition and Order for Hearing, at 3.

<sup>[12]</sup> See, *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 (K) (2007); Minn.R.Civ.P. 56.03.

<sup>[13]</sup> See, Minn. R. 1400.6600 (2007).

<sup>[14]</sup> See, *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>[15]</sup> See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

<sup>[16]</sup> Compare, e.g., *Mahoney v. Minnesota Department of Highways*, 161 N.W.2d 45, 46-47 (Minn. 1968) (a subsequent statute which provided that an appointee was subject to discharge without cause during a probation period, was inconsistent with, and superseded, the VPA); *Schoen v. County of St. Louis*, 448 N.W.2d 112, 115 (Minn. App. 1989) (the "reference to chapter 347 in Minn. Stat. § 383C.056 clearly indicates that the legislature was aware of the conflict with the veterans preference law and chose to supersede the hearing requirement when an employee was discharged from a probationary position").

- [17] Compare, generally, *Sprague v. Heise*, 67 N.W.2d 907, 910-12 (1954); *Walters v. Ramsey County*, 410 N.W.2d 343, 345 (Minn. App. 1987).
- [18] See, *Schoen*, 448 N.W.2d at 114.
- [19] Compare, Minn. Stat. § 197.48 (1971); 1931 Laws of Minnesota, Ch. 347, § 2.
- [20] Compare, Minn. Stat. §§ 197.48 and 375A.06 (2006).
- [21] Compare, Minn. Stat. §§ 197.46 and 375A.06 (2006) with *Schoen*, 448 N.W.2d at 114-15.
- [22] *Caffrey v. Metropolitan Airports Comm'n*, 246 N.W.2d 637, 640 n.2 (Minn. 1976) (citations omitted).
- [23] Compare also, Footnote 16, *supra*.
- [24] See, *Granite Falls Munic. Hosp. and Manor Bd. v. Dep't of Veterans Affairs*, 291 N.W. 2d 683, 685 (Minn. 1980); *Sprague v. Heise*, 67 N.W. 2d 906, 910-11 (Minn. 1954); *State ex rel. McCosker v. City Council of Minneapolis*, 208 N.W. 1005, 1006 (Minn. 1926).
- [25] See, Minn. Stat. § 197.46 (2006); *Holmes v. County of Wabasha*, 402 N.W.2d 642, 644 (Minn. App. 1987).
- [26] See, *State ex rel. McGinnis v. Police Service Comm'n of Golden Valley*, 91 N.W.2d 154, 163 (Minn. 1958).
- [27] See, *Ammend v. County of Isanti*, 486 N.W.2d 3, 5 (Minn. App. 1992).
- [28] See, Aff. K. Hastings, Ex. C, at 1 (emphasis added).
- [29] *Id.*, at 1; Aff. K. Hastings, Ex. F.
- [30] See, First Aff. of M. Petersen, at ¶ 12.
- [31] *Id.*, at ¶ 13.
- [32] See, *id.*, Second Affidavit of Michael Petersen, at ¶ 2 (February 15, 2008); Affidavit of David Kircher, at ¶ 3; Respondent's Reply Brief, Exs. 1 and 2.
- [33] 291 N.W.2d 683, 686 (Minn. 1980).
- [34] *Id.*
- [35] *Id.*
- [36] See, *State ex rel. Stubben v. Board of County Commissioners*, 141 N.W.2d 499, 506 (1966) (VPA did not apply to county hospital administrator under department head exclusion because the relevant statutes gave the administrator "almost complete control over administrative functions of the hospital"); *Schander v. Washington County*, OAH Docket No. 15-3100-14505-2 (2001) ("it must be determined whether the Petitioner was entitled to notice and a hearing [under the Veterans Preference Act]. If he was a department head, there was no such right, and no back pay is appropriate") (<http://www.oah.state.mn.us/aljBase/310014505.OR.htm>).
- [37] Compare, Minn. Stat. §§ 179A.07 and 179A.13 (2006); *Minnesota Teamsters Public & Law Enforcement Employees' Union, Local # 320*, 611 N.W.2d 355, 360 (Minn. App. 2000) (probationary employee did not have arbitration or grievance rights under union's collective bargaining agreement); *Tyo v. Ilse*, 380 N.W.2d 895, 897-98 (Minn. App. 1986) ("PELRA does not provide any procedural or substantive protection to probationary employees").
- [38] Compare generally, *AFSCME Council 96 v. Arrowhead Regional Corrections Board*, 356 N.W.2d 295, 297-98 (Minn. 1984) (veterans preference rights are separate and distinct from rights granted under civil service provisions and applicable collective bargaining agreements).